

Ever Loyal to the Land

The Story of the Native Hawaiian People

By Melody Kapilialoha MacKenzie

*Kaulana nāpua a 'o Hawai'i
Kūpa'a mahope o ka 'āina*

*Famous are the children of Hawai'i
Ever loyal to the land*

These lyrics are from a song by Ellen Keho'ohiwaokalani Wright Prendergast, written shortly after the overthrow of the Hawaiian Kingdom in 1893. They express the sorrow of the Native Hawaiian people and their determination to oppose annexation to the United States. The song further declares, "No one will fix a signature / To the paper of the enemy / With its sin of annexation / And sale of native civil rights . . . / We are satisfied with the stones / The astonishing food of the land," and concludes with the lines, "We back Lili'u-lani / Who has won the rights of the land / Tell the story / Of the people who love their land."

The story of the Native Hawaiian people, a people who love their land, is a complicated and difficult one. But when told in broad strokes, it is a familiar one: a story of an indigenous people and of greed, racism, and imperialism.

Foundation of the Kingdom

The Polynesian ancestors of the Hawaiian people undertook the long ocean voyage from the Marquesas Islands to Hawai'i at least 1,700 years ago. At European contact in 1778, an estimated 400,000 to 800,000 Hawaiians lived in a society with highly complex political and social systems. Separate high chiefs governed the major islands, with subordinate chiefs managing *ahupua'a*, self-sustaining land units encompassing broad plains



Office of Hawaiian Affairs Chair Haunani Apoliana performs near portraits of Hawai'i's last royal rulers on the anniversary of the 1893 overthrow of the Hawaiian monarchy.

Associated Press, AP

near the sea running up valley ridges to the mountains. Within the *ahupua'a*, the people had use rights to the resources necessary to sustain life—access to offshore fishing and shoreline gathering; plots of land and sufficient water for growing taro, banana, breadfruit, or sweet potatoes; the right of way to the uplands for timber and fuel; and the right to hunt and gather wild plants and herbs.

After European contact, Hawaiians quickly adopted foreign technology, and by 1810, Kamehameha I united the islands under one rule, aided first by cannons and firearms and then by diplomacy. By 1840, Kamehameha's successors had established a constitutional monarchy, recognized as a fully independent and sovereign nation, entering into treaties with the United States, Great Britain, France, and other nations.

Although private property did not exist in traditional Hawaiian society, in the late 1840s Kamehameha III, upon the advice of western advisors and under pressure from foreign governments—who frequently used gunboat diplomacy to enforce the claims of their citizens living in Hawai'i—instituted private land ownership. Through the *Māhele* (division) process, the intertwining interests of king, government, chiefs, and common people were separated. Of Hawai'i's four million acres, roughly, the king received 24 percent, the government 36 percent, and the chiefs 39 percent. The common people received less than 1 percent, only 28,658 acres, albeit the most fertile and productive lands. Even though the king and chiefs received vast acreages during the *Māhele*, they lacked the capital or skills to operate

in a cash economy. Subsequent laws allowed any resident, regardless of citizenship, to own land; adopted the adverse possession doctrine; and permitted nonjudicial mortgage foreclosures, thereby leading to loss of lands by king, government, chiefs, and commoners alike.

Hawaiians as a race also appeared to be dying out. In 1832, the Native census showed a population of 130,000. By 1870, it had dropped to between 40,000 and 50,000. By 1890, it had decreased to only 35,000, although the part-Hawaiian population was slowly growing.

In the years after the *Māhele*, the kingdom's economy became dependent on large agricultural crops, especially sugar, grown on plantations owned by American and British interests. By the 1880s, dependence on the American market caused business interests to favor annexation to the United States to ensure that Hawaiian sugar and other produce could enter the United States free of tariffs. In 1887, these business interests forced King Kalākaua to adopt a new constitution, known as the Bayonet Constitution, limiting the crown's authority, effectively increasing the influence of the nonnative merchant faction and disenfranchising most natives. Not surprisingly, Kalākaua's successor, Queen Lili'uokalani, chafed under the constraints of this constitution. In January 1893, the queen sought to promulgate a new constitution returning authority to the throne and the native people.

Overthrow and Annexation

Using the queen's actions as the rationale, a small group of businessmen, including Americans, and other annexationists conspired to overthrow the government of Hawai'i. They immediately called for the aid of John L. Stevens, U.S. minister to the Hawaiian kingdom. Stevens caused U.S. armed forces to invade the Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian government buildings and the palace. On the afternoon of January 17, a Committee of Safety representing American commercial interests deposed the Hawaiian monar-

chy and announced the establishment of a provisional government. Minister Stevens quickly extended diplomatic recognition to that government. Soon thereafter, the queen, seeking to avoid bloodshed, relinquished her authority under protest, fully expecting that the United States would repudiate Stevens's actions.

On February 1, Stevens raised the American flag and proclaimed Hawai'i to be a protectorate of the United States. The provisional government immediately sought annexation to the United States. However, after an investigation, newly inaugurated President Grover Cleveland refused to recognize the legitimacy of the provisional government and called for restoration of the monarchy. Instead, the Republic of Hawaii was established on July 4, 1894.

In 1897, President William McKinley took office on a platform advocating "control" of Hawai'i. The new administration negotiated an annexation treaty, which was ratified by the Hawaiian Republic's Senate on September 8, 1897. When an annexation treaty with the United States appeared imminent, Native Hawaiians presented petitions to the U.S. Congress—over 21,000 signatures—protesting annexation and calling for the restoration of the Hawaiian government. The annexation treaty failed.

But, during the next year, pro-annexation forces introduced a joint resolution of annexation. The annexation of Hawai'i by joint resolution was hotly debated in the U.S. Senate. Many argued that the United States could acquire territory only under the treaty-making power of the U.S. Constitution, requiring ratification by two-thirds of the Senate. Nevertheless, with the advent of the Spanish-American War, the islands became strategically significant; annexation was accomplished through a joint resolution, requiring only a simple majority in each house.

The Joint Resolution of Annexation, 30 Stat. 750 (1898), made no provision for a vote by Native Hawaiians or other citizens, assuming instead that ratification of a treaty by the Hawaiian Republic's Senate almost a year earlier

showed sufficient assent. Under the joint resolution, the republic ceded 1.8 million acres of crown, government, and public lands to the United States. In the Organic Act of 1900, 31 Stat. 141 (1900), Congress established the Territory of Hawaii, placed these ceded lands under its control, and directed that proceeds from the ceded lands be used for the benefit of the inhabitants of Hawai'i for education and other public purposes.

Recognition by Hawaiian leaders, and eventually by Congress, of the rapidly deteriorating social and economic conditions of the Hawaiian people led to the passage in 1921 of the Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1921). The HHCA set aside approximately 200,000 acres of ceded land for a homesteading program for native Hawaiians, defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." In hearings leading to the HHCA's passage, the relationship between the United States and Native Hawaiians was deemed analogous to the trust relationship between the United States and other Native Americans.

Statehood and Litigation

When Hawai'i became a state in 1959, Congress turned over administration of the HHCA to the state. The state, in turn, accepted a trust responsibility for the program. In addition, Congress transferred another 1.2 million acres of ceded lands to the state, creating a public land trust for five specified purposes, including "the betterment of the conditions of native Hawaiians, as defined in the [HHCA]." Admission Act, 73 Stat. 4, §§ 4 & 5 (1959). It was not until 1978, however, with amendments to the state constitution, that proceeds from the ceded land trust were finally designated for the benefit of Native Hawaiians. The amendments established the Office of Hawaiian Affairs (OHA), to be governed by a nine-member Native Hawaiian board of trustees elected by Native Hawaiian voters, to administer those

funds. HAW. CONST., art. XII, §§ 5 & 6.

Providing Native Hawaiians with a measure of self-governance was a second important objective in OHA's creation. For a twenty-year period, all Native Hawaiians, regardless of blood quantum, elected OHA trustees to administer trust proceeds and other funds and to establish programs benefiting Hawaiians.

In 2000, the U.S. Supreme Court in *Rice v. Cayetano*, 528 U.S. 495 (2000), rejected entirely the idea of self-governance. The Court held that restricting the electorate for OHA trustees solely to those of Hawaiian ancestry was race-based and violated the Fifteenth Amendment. The Court distinguished OHA elections from those of Indian

litigated in the courts. Several of these suits have been dismissed for lack of standing. *See, e.g., Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003). In another lawsuit, *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005), challenging the constitutionality of both the Hawaiian Homes program and OHA, all claims against Hawaiian Homes and most claims against OHA were dismissed on standing grounds. A single claim challenging the use of state tax funds for OHA's programs benefiting all Hawaiians was remanded for a determination on the merits. All proceedings have been stayed in that case while a petition for writ of certiorari is pending in the Supreme Court.

Kamehameha Schools is a private educational institution funded from the lands of the Kamehameha chiefs and established under the 1884 will of Princess Bernice Pauahi Bishop, the last direct descendant of Kamehameha I. The Hawaiian ancestry preference and Kamehameha's educational programs are designed to address and remedy the severe educational problems experienced by Hawai'i's native children. The fate of the admissions policy remains in the balance; an adverse ruling by a panel of the Ninth Circuit has been vacated and an en banc rehearing granted. *Doe v. Kamehameha Schools*, 2006 U.S. App. LEXIS 4167 (2006).

Ironically, in the 2002 Native Hawaiian Education Act, Congress made specific findings about the educational needs of Native Hawaiian children, looking to data and information compiled by Kamehameha Schools, and established programs specifically to address those needs. Since the 1970s, Congress has passed numerous laws benefiting Native Hawaiians, most using an expansive definition of Native Hawaiian, with no blood quantum requirement. Some laws—such as the Native American Languages Act and the Native American Graves Protection and Repatriation Act—include Native Hawaiians in programs along with other Native Americans. Others—such as the Native Hawaiian Healthcare Improvement Act of 1988 and the Hawaiian Home Lands Homeownership Act of 2000—are directed solely at Native Hawaiians.

Partially in response to the *Rice* decision and other litigation, legislation is now pending in the U.S. Congress to clarify the legal status of Native Hawaiians and to allow reorganization of a government that would be recognized by the United States. *See* S. 147 and H.R. 309, The Native Hawaiian Government Reorganization Act. Moreover, in 2004, Congress established the Office of Native Hawaiian Relations in the secretary of the Interior's office.

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Native Hawaiians never directly relinquished their inherent sovereignty as a people or over their national lands.

tribes, which are “the internal affair[s] of a quasi-sovereign.” In contrast, the Court said, the OHA elections “are the affair[s] of the State of Hawaii, OHA is a state agency, established by the State Constitution, responsible for the administration of State laws and obligations.” *Id.* at 520. Subsequently, the Hawai'i state laws limiting OHA trustee candidates to those of Hawaiian ancestry were also overturned as violating the Fifteenth Amendment and the Voting Rights Act. *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002).

The Court's decision in *Rice* was narrow, based solely on the Fifteenth Amendment and not on Fourteenth Amendment equal protection grounds. The Court also declined to decide whether Congress has the power to treat Native Hawaiians as it does the Indian tribes. That question, and the legality of existing programs for Native Hawaiians, is now being actively

In a related case, individual Native Hawaiians filed suit against the secretary of the Interior, claiming that regulations limiting the administrative federal recognition process to groups “indigenous to the continental United States” violated Fifth Amendment equal protection guarantees. In *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), the Ninth Circuit Court of Appeals, applying rational basis review, determined that the regulations were constitutional, stating, “It is rational for Congress to provide different sets of entitlements—one governing native Hawaiians and another governing members of American Indian tribes.” *Id.* at 1282–83.

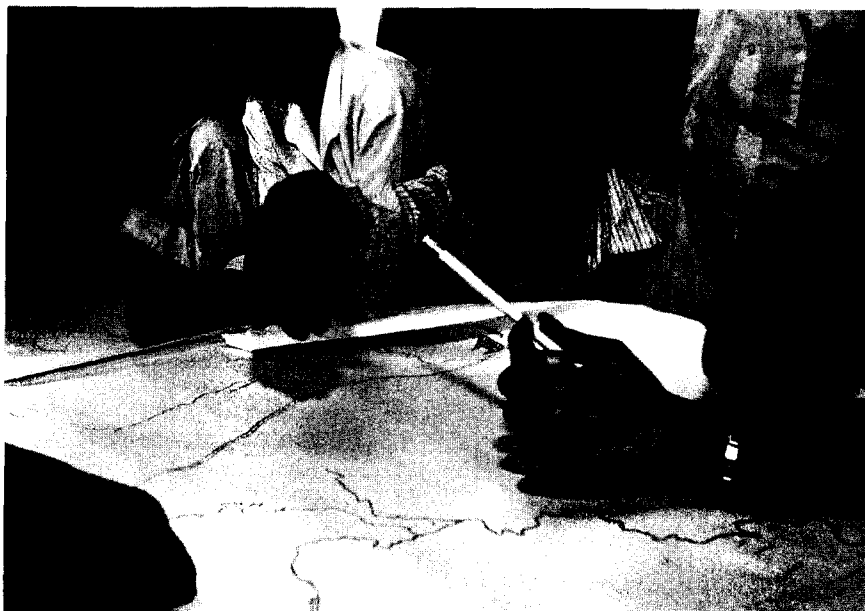
Finally, another suit filed under 42 U.S.C. § 1981 has challenged the Kamehameha Schools admissions policy of giving preference to children with Hawaiian ancestry. This case represents a unique set of facts. The

Protecting and Preserving Indigenous Communities in the Americas

By F. Michael Willis and Timothy Seward

You must first change the way people think." That was the wisdom passed to a representative of the Washoe Tribe by an indigenous Buryat monk from the Russian state Buryatia, discussing how to protect Lake Baikal and the lands and natural resources of cultural importance to the indigenous people that region in southern Siberia. Notwithstanding international norms and national laws to protect indigenous peoples' customary use and tenure of their lands, persuading nonindigenous authorities and businesses to respect these rights demands innovative strategies that blend a variety of approaches and tools. As economic globalization introduces commerce to new regions and private actors seek to exploit new resources, indigenous peoples' cultural identity and very survival may hinge upon their ability to design new tools and breathe fresh life into existing mechanisms to change the thinking of governments, businesses, and the public at large.

Many places sacred to indigenous peoples are sources of both material and spiritual sustenance. Harvesting certain crops, catching a particular fish, or hunting certain animals reflects both economic needs and sacred customs. By guiding the public to a new understanding of the environment and the continuing relationship of the indigenous people to the land, indigenous communities have shown that it is possible to change the way people think. The Washoe Tribe, for instance, has successfully expanded its authority and responsibility with respect to its place of origin, Lake Tahoe. Through



An Indian describes the area where he grew up and assists the government in demarcating his tribe's territory.

public relations, economic development, and environmental restoration activities, the tribe has emerged as an equal partner with the states of California and Nevada in the planning and management of the Lake Tahoe region.

Throughout North and South America in recent years, indigenous peoples have been confronted by initiatives that pose devastating consequences. With accelerating frequency, state and private actors enter indigenous territories to extract resources, develop energy, promote recreational and tourism activities, and expand industries. These activities often take place without consulting or benefiting indigenous communities. While beneficial opportunities for indigenous people may have emerged in some cases, a recent World Bank study shows indigenous poverty rates in Latin America as un-

changed in the last decade. Indigenous children get less schooling, go hungry more often, and have less access to health care. Rather than improve these conditions, commercial activities often expose indigenous communities to hazards, risks, and wastes that contaminate their lands and interfere with their access to the cultural- and life-sustaining resources found in their traditional territories.

Charting New Legal Terrain

For more than a decade, International Labor Organization (ILO) Convention 169 has specified terms under which states must recognize and protect ownership of indigenous peoples' lands and cultural practices. In Latin America, however, that convention has not been observed until recently. In the past five years, the Inter-American Court of Human Rights and other in-

ternational institutions have interpreted that convention to have relevance to Latin American indigenous communities faced with the loss and destruction of their lands and resources.

The landmark ruling of the Inter-American Court in *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001), affirmed that the right to property, as articulated in article 21 of the American Convention on Human Rights, includes the communal property of indigenous people as defined by their customary use and tenure, notwithstanding its treatment under national law. The Awas Tingni community brought the case to challenge concessions granted by the Nicaraguan government that permitted several companies to log on lands in traditional Awas Tingni territory. The government claimed the lands were state property because Awas Tingni members held no formal title. The court determined that applicable human rights law, including ILO Convention 169, protects indigenous peoples' land tenure such that "possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property." *Id.* at ¶ 151. The court ordered demarcation and titling of the Awas Tingni lands, the boundaries of which to be determined "in accordance with [the communities'] customary laws, values, customs and mores." *Id.* at ¶ 173(3).

The court has followed and extended this approach in *Moiwana Village v. Suriname*, Judgment of June 15, 2005, and *Yakye Axa indigenous community v. Paraguay*, Judgment of June 17, 2005. In clarifying its order requiring demarcation, title, and the return of sacred territory in the latter case, the court stressed that the valuing of indigenous lands calls for criteria other than those usually applicable to private property. Other considerations must be weighed because "indigenous community culture . . . derives from the relationship with traditional territories and the resources located therein, not only because these provide a means of sub-

sistence, but because they are integral elements of their cosmovision, religion and their cultural identity." *Id.* at ¶ 135.

The Inter-American Court has not limited its recognition of the collective rights of indigenous communities to its interpretation of the right to property. It has taken into account the impacts on cultural practices and beliefs in its consideration of the damage award for the Achi Mayan survivors represented in *Plan de Sanchez Masacre v. Guatemala*, Decision on reparations, Nov. 19, 2004, Inter-Am. Ct. H.R. (Ser. C) No. 116 (2004). The court found that the Guatemalan military's 1982 massacre of 284 Plan de Sanchez community members caused harm above and beyond each survivor's displacement and resettlement in townships administered by the Guatemalan military. The court ordered the government to pay damages for communal cultural harms, including:

- impeding proper burial of the dead,
- divorcing the community from customary funeral rites and other traditions,
- dislocating transmission of cultural practices to new generations by the murder of elders and women responsible for disseminating these practices, and
- forcing survivors to live in military-controlled towns rather than under their traditional communal structure.

The core elements of these determinations have been adopted by other regional and United Nations (UN) bodies. In March 2006, for example, the UN Committee for the Elimination of Racial Discrimination (CERD) relied in part upon the Inter-American Court's approach to indigenous property rights in its early warning and urgent action decision on the situation of the Western Shoshone peoples in the United States. The decision found that the "Western Shoshone people's legal rights to ancestral lands have been extinguished through gradual encroachment, notwithstanding the fact that the Western Shoshone peoples have reportedly continued to

use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns." CERD, Early Warning and Urgent Action Procedure Decision 1 (68), Mar. 10, 2006, ¶ 6.

Among the issues prompting this urgent action were destructive activities planned on areas of spiritual and cultural significance to the Western Shoshone people, particularly the "reinvigorated federal effort" to open a nuclear waste repository at Yucca Mountain. The CERD rejected the U.S. argument that the Western Shoshone lands were duly extinguished pursuant to proceedings of the Indian Claims Commission (ICC). Citing the Inter-American Commission on Human Rights case of *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, doc. 5 rev. 1, at 860 (2002), the committee concluded that the ICC proceedings, as carried out in the case of the Western Shoshone, "did not comply with contemporary human rights norms, principles and standards that govern determination of indigenous property interests." CERD, *supra*, at ¶ 6 (quoting *Dann v. United States*, at ¶ 139). The committee calls for the United States to initiate dialogue to find a solution acceptable to the Western Shoshone, in accordance with CERD General Recommendation 23 on the rights of indigenous people to own, develop, control, and use their communal lands, territories, and resources.

Mobilizing to Enact National Indigenous Lands Laws

National legal systems may recognize communal lands through the ratification of international agreements such as ILO Convention 169 and through provisions in national constitutions and legal codes. Yet those provisions are often unenforced. Ad hoc and formal working groups in Panama, Nicaragua, Guatemala, and Honduras have emerged to craft terms and create processes to protect the rights of specific indigenous communities. For example, in Guatemala, Achi Mayan indigenous communities and nongovernmental

organizations in the areas most devastatingly affected by the Chixoy Dam, funded by the World Bank and the Inter-American Development Bank, prepared symposia and scheduled drafting sessions for June and July 2006 to develop legislation to protect their communal lands.

Despite Guatemala's ratification of ILO Convention 169, the Guatemalan government passed legislation that fast-tracked grants to private entities for mineral leases on indigenous lands without consulting affected indigenous communities or seeking to mitigate impacts on indigenous lands or resources. Under Guatemala's 1997 General Mining Law, the state retains ownership of subsurface rights and provides for private licenses in exchange for a 1-percent royalty shared between the federal government and the municipality in which the mine is operating. This law permits forced expropriation of lands and involuntary resettlement of indigenous communities, both facial violations of ILO Convention 169.

As applied, the mining law has eroded indigenous community rights, particularly consultation rights as provided by ILO Convention 169, article 7. Article 7 requires *actual* consultation, in which affected indigenous peoples have a right to express their points of view and a right to influence the decision. Defensoria Q'eqchi, a Guatemalan indigenous rights organization, has tracked mining concessions granted in Guatemala since the 1997 mining law was enacted. Of the 147 exploration licenses and 264 exploitation licenses granted, none involved actual consultation as required by article 7. Defensoria Q'eqchi reported: "The granting of hundreds of concessions . . . constitutes a serious violation of the rights of thousands of Guatemalans, indigenous or not, who were never consulted nor informed that the subsurface rights to their lands had been granted to a mining company." Defensoria Q'eqchi, *Analysis of Mining Concessions: Indigenous Land and Cultures Endangered*, at 5 (Feb. 2004) (distributed in translation by RIGHTS

ACTION, Apr. 4, 2004).

Indigenous communities in the Sipicapa Maya region of San Marcos, Guatemala, have responded to mining operations with both nonviolent resistance and the application of traditional community law. A month-long road-block by indigenous communities seeking to prevent delivery of equipment to a mine operated by the Canadian subsidiary of the American company, Glamis Gold, ended in bloodshed. In January 2005, the Guatemalan government deployed 700 police using tear gas and live ammunition to open the

The lands of indigenous peoples are sought by today's global enterprises.

roadway, killing one person and injuring seventeen others. The Sipicapa communities responded in June 2005 with a community consultation and referendum implemented in accordance with Sipicapa Maya traditional justice principles, the Guatemala Law of Urban and Rural Development Councils, the Guatemalan Constitution, and ILO Convention 169. The consultation resulted in eleven Sipicapa communities opposing the mining, one voting in favor, and one abstaining.

Glamis Gold brought suit, urging Guatemala's Constitutional Court to rule the consultations invalid. In April 2006, however, that court affirmed the validity of the community consultations, relying heavily on the consultation's legal basis in traditional indigenous law and the protections afforded by ILO Convention 169. Glamis Gold will likely challenge the ruling and

seek protection of its property rights in the mining license granted under the General Mining Law.

This is not Glamis Gold's first legal challenge to indigenous land rights. A Glamis open pit mine application to the U.S. Department of the Interior's Bureau of Land Management (BLM) in 2000 was denied by Secretary Bruce Babbitt in January 2001 due to "substantial irreparable harm" to environmentally and culturally significant land. The proposed operation would remove natural ridge lines in the Indian Pass region of California, where members of the Quechan Tribe hold "dreaming" ceremonies. After the Bush administration suspended the BLM regulations on which the ruling had been based, Interior Secretary Gale Norton authorized the operation in October 2001. The California legislature then passed a law in 2003 that required backfilling and grading to restore the original contours of surface mined lands. Glamis reacted by filing a \$50 million compensation claim against the federal government and the state of California under Chapter 11 of the North American Free Trade Agreement. Glamis identified the state law requirements as "tantamount to expropriation." At this point, no work has ever commenced on the mine.

From Recovery and Resistance to Governance

Indigenous communities have also used local governmental authority to protect and defend their resources and their rights. Surrounded by volcanoes, Lake San Pablo (or Imbakucha) in Otavalo, Ecuador, is one of the country's main tourist destinations. The Otavalo and other Quichua indigenous communities that reside in the region depend on the lake for bathing, washing clothes, and watering cattle, as well as for *tatora* reeds used to make sleeping mats and build boats. San Pablo is one of several sacred lakes in the region, along with the three Mojan-da lakes and Lake Cuicocha. And Lake San Pablo is seriously contaminated.

Indigenous organizations working

to defend lands and resources, such as Lake San Pablo, have prompted Ecuador to adopt new, participatory approaches to local government. Through this process, indigenous communities have effectuated change by electing indigenous representatives and creating administrative mechanisms that more adequately reflect their traditions. Auki Tituaña, the indigenous mayor of Cotacachi (which borders Otavalo), notes positive results: "After 504 years of mestizo administration governing on behalf of a small handful of families, we've overcome these hurdles, and indigenous and nonindigenous can be proud of the accomplishments." Interview by Orlando Perez with Mayor Auki Tituaña, *El Trabajo Colectivo es la Clave*, www.Hoy.com.ec/ANIVERSARIO19/Inioco6.htm (2001).

Using the participatory framework, indigenous, mestizo (of indigenous and nonindigenous heritage), and Afro-Ecuadorians united to press Cotacachi County to enact an ecological ordinance to keep a copper mine out of a culturally and resource significant cloud forest region. The ordinance, which established Cotacachi as an "ecological county," serves as a tool to restrain environmental degradation and introduces incentives for clean industry technologies and sustainable resource use. Policies developed under the ordinance include community-based ecotourism and the creation of community-based protected areas. The municipal Web site describes the ordinance as a "seismic shift in the fundamental understanding of what is meant by 'development and the management of natural resources.'" See www.cotacachi.gov.ec/htms/esp/Municipio/ordenanzas.htm#eco.

Indigenous communities on the Bolivian and Peruvian shores of Lake Titicaca have confronted erosion, loss of vegetation, and massive contamination of the lake from solid and industrial waste, chemical waste, and fertilizer runoff. Recent studies estimate that the lake will be extinct within ten years. To regulate and manage the lake and its resources, the fourteen indigenous

municipalities bordering the Bolivian side of the lake united in March 2003 as a governmental consortium under the Bolivian law of *mancomunidades* (municipal consortia). Later that year, Bolivian President Carlos Mesa joined Peruvian President Alejandro Toledo in inaugurating the Bi-National Mancomunidad of Lake Titicaca, which unites the fourteen Bolivian shoreline municipalities with the thirty-four indigenous communities on the Peruvian shore. The initiative seeks not only to reverse contamination levels but also provide terms for economic revitalization and sustainable development for the indigenous communities bordering the lake.

The Washoe Tribe Approach

Indigenous efforts to protect cultural sites and resources also exist in the United States. The federally recognized Washoe Tribe of Nevada and California has used several of the tools mentioned above to protect and reacquire their homelands and preserve their culture. The ancestral lands of the tribe consist of at least one-and-a-half-million acres spanning what is now eastern California and western Nevada. Lake Tahoe's *Da ow a ga* (edge of the lake) has been the heart of the Washoe Tribe's civilization and culture for thousands of years. Since the Gold Rush of the 1850s, the tribe has been denied access to a crucial part of their homeland and the ability to conduct important cultural practices. In seeking redress, the tribe has relied upon a number of federal laws and policies, including the National Historic Preservation Act, the National Environmental Policy Act, and the Comprehensive Environmental Response and Liability Act (CERCLA, or Superfund Act).

In the late 1990s, the tribe successfully competed for a long-term Forest Service concession permit for a lakeshore resort and marina. In the operation of this resort, the tribe has returned Washoe people to the lakeshore, reawakened the traditions and history of the place, created a forum for public education, and entered the Tahoe economic community as a full partner.

As part of a Support Agency Cooperative Agreement with the U.S. Environmental Protection Agency under CERCLA, the Washoe Tribe is working to remediate contamination to tribal lands and traditional use areas on public lands from an abandoned open pit sulfur mine that was listed as a federal Superfund site in 2000. With the support of federal and state agencies, the tribe is seeking to establish remediation standards based upon a human health risk assessment that will protect tribal members engaged in traditional and customary activities on affected lands. As part of the restoration process, under the federal Natural Resources Damage and Restoration Program, the tribe will seek the acquisition of replacement lands with similar resources.

New Tools for Change

Analogous to the Gold Rush that tore lands away from American Indian communities 150 years ago, the lands of indigenous peoples are sought for commercial potential by today's global enterprises. Faced with the threatened loss and destruction of lands and resources vital to their cultural practices and essential for their survival, indigenous communities throughout the Americas are forging new tools to address these challenges. It remains to be seen whether they will be able to consistently change the way people think.

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The Highest Possible Health Status for Indians

By H. Sally Smith

In 1976, the United States undertook in the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601 *et seq.*, a commitment to provide “the highest possible health status for Indians.” That commitment, which was preceded by many treaties promising health care to Indian tribes, was reaffirmed in 1992. Portions of the act expired in 2001. While the authorization to provide federal funds for Indian health problems still exists in a broad 1921 statute providing for federal health care for Indians, the failure of Congress to reauthorize the health care act (including amendments to strengthen the Indian health program) for the past five years has clouded the federal commitment.

In some sections of the public, a view apparently exists that the entire federal effort to improve the health status of Indians has failed and should be abandoned. For example, Dr. David Eichler, the president of the Alaska Dental Society, has denounced the entire concept of a federally funded health program for Indian and Alaska Native peoples in the January 2006 Alaska Dental Society newsletter.

“One reason for failure,” he commented in a version of his article available on the Internet, “is because the socialist model removes any responsibility from the client and breeds resentment because of dependency. . . . We establish the Natives as *de facto* slaves . . . The most effective action we could take would be to remove all special federal assistance for all American Indians” in order to allow “their integration into American society as dignified citizens.” See Posting of Dr. David Eichler, northpoledentist@gci.net, to owner-dental-publichealth@list.pitt.edu (Mar. 1, 2006) (copy on file with



An elderly Navajo woman is treated at the Montezuma Creek Community Health Clinic on a reservation near Bluff, Utah.

Associated Press, AP

author). Eichler’s lack of knowledge about the origins and reasons for the federal commitment to Indian and Alaska Native health care is revealed by his statement, “For some reason in the 1920’s [sic] the federal government decided to establish by legislation that it would take upon itself the role of health care provider for American Indians.”

His point of view ignores both the federal obligation to provide health services to Indians in exchange for the relinquishment of vast tracts of Indian land and the impressive improvement in Indian and Alaska Native health care that the Indian Health Service (IHS) has made since it was founded in 1955. For example, between the early 1970s and 2002, the tuberculosis mortality rate for Indians and Alaska Natives was reduced by 80 percent, the cervical cancer rate by 76 percent, the infant mortality rate by 66 percent, and the maternal mortality rate by 64 percent.

Eichler asserts that abolishing the IHS program would improve Indian health status. Yet many Indians and Natives live in remote areas where access

to non-IHS health care is very limited or nonexistent. And, notwithstanding the accomplishments of the IHS, Indians remain afflicted by many diseases at higher rates than other Americans.

In addition, since native people now live longer, they face increasing risks from certain diseases that come with age. They are in greater need of nursing care, long-term care, and home health care, which the IHS has provided rarely and reluctantly. In addition, diabetes is one of the fastest growing threats to native health. The Indian death rate from diabetes is 3.3 times that of non-Hispanic whites. Cervical cancer death rates are still 3.8 times higher.

I have been actively involved in the administration of Indian health programs, serving as chair of the board of the Bristol Bay Area Health Corporation, a tribal organization that provides health services to Natives in the 45,000-square-mile Bristol Bay region of Alaska. I have also been chair of the Alaska Native Health Board, and I am currently chair of the Alaska Native Medical Center Joint Operating Board

and the National Indian Health Board. It boggles my mind that anyone can describe the agency that has accomplished so much to improve Indian health status as “enslaving” native people. While I have been involved in addressing Indian health problems, a major innovation has been the decentralization of the IHS program through the transfer of responsibilities from the federal bureaucracy to Indian tribes and tribal organizations. In Alaska, the entire delivery of federally funded health care to Native villages is in the hands of the villages themselves or their designees.

The United States needs to stay the course. The pending Senate bill to reauthorize the IHCA broadens authorization to meet contemporary health-care needs in Indian Country, including strengthening the present diabetes program and express authorization for long-term care, home health care, hospice, and assisted living. The latter are especially important in remote rural areas because the elderly should be able to stay home among their friends and family during their last years.

The bill also includes provisions to address the deterioration of federally owned Indian health facilities, including water and sewer facilities. In Alaska Native villages, due to minimal water facilities, the infant pneumonia hospitalization rate is eleven times the

national average. The shocking state of many of the buildings in which Indians receive the federal health care to which they are entitled is a particularly appalling feature of the contemporary scene in Indian Country.

Congress not only needs to authorize these programs, it also needs to *fund* them. There is at present a backlog of \$429 million for essential maintenance, alteration, and repair of Indian health facilities. This has not been a priority with the budget people in the Bush administration, who asked Congress for \$52,668,000, an increase of only \$1 million, an adjustment for inflation, in the 2007 budget request.

The pending bill also includes provisions designed to increase the number and effectiveness of health-care professionals in Indian Country. Building on the experience with the effective community health aide program in Alaska, it would authorize the extension of that program to Indian Country throughout the United States. The bill would also encourage the government to expedite the construction of new health-care facilities, including water and sewer facilities, to serve Indian and Alaska Native communities, addressing the serious deficiencies in both the number and condition of existing facilities, and it would strengthen the ability of Indian people to recover re-

imbursement for the costs of health-care from nationally available programs such as Medicare and Medicaid, in which they are entitled to share but frequently encounter barriers to enrollment.

Without diminishing the federal commitment to health care in Indian Country, the bill would also address the availability of health care for some 650,000 Indians who live in urban areas in the United States by eliminating some of the disparities between programs for reservation Indians and urban Indians.

Indians are grateful to the American Bar Association for calling on Congress to pass the IHCA reauthorization in 2004 and again in 2005. While gains in Indian health over the past fifty years are evident, the shortages in both staffing and facilities call for a renewed legislative initiative. Even as the United States faces the many challenges of the twenty-first century, Indian and Alaska Native health care should not be relegated to the back burner.

H. Sally Smith is an Alaska Native and health-care professional who works with the Bristol Bay Area Health Corporation to provide health services to residents of southwest Alaska. She is chair of the National Indian Health Board.

Cobell v. Norton

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In the end, the goal is the same as it has always been: redress of past wrongs and reform of the system so the malfeasance will end.

A Fair Resolution

Congress presently is considering a bill to resolve the *Cobell* case. The plaintiffs support a fair resolution. What is fair? Interior's internal report from 2002 placed liability at between \$10 and \$40 billion. Obviously, anything less than conceded liability can-

not possibly be equitable.

Another way to calculate a fair settlement figure is by using an error rate calculation. The government admits that \$13 billion in proceeds, not including interest, was deposited into the trust from 1909 to 2000. Using the *actual* interest rates in which these funds were invested, if one presumes a 20-percent error rate, \$29.6 billion is owed. In light of the documented record of malfeasance, spoliation of records, fraud, corruption, use of Indian monies as “slush funds,” etc., a 20-percent error rate—presuming 80 percent of the funds were properly collected, invested, and disbursed to the correct benefici-

aries—is obviously a presumption highly favorable to the government.

In the end, this case is simple. Since the trust's inception, the government has assumed the powers of a trustee without abiding by the concomitant responsibilities. The result has been a legacy of incompetence and abuse that is plainly intolerable and must cease. This case will right that wrong.

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A Brief History of the U.S.-American Indian Nations Relationship

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organizations began to lobby Congress. Both major political parties endorsed tribal self-determination in their 1960 platforms, as they have in every presidential year since. President Nixon formally renounced termination in 1970. Nixon also proposed that tribes be authorized to operate federal programs serving reservations. Congress responded by passing the Indian Self-Determination Act. Under it, many tribal governments now administer programs funded through the BIA and the Indian Health Service. Tribal police and courts enforce minor crimes, and tribal governments have departments that address many problems of modern resource and environmental law.

The other major development of the modern era is involvement of the courts. Except for claims cases against the government for damages, tribal rights were rarely litigated before 1959. The right of tribal sovereignty recognized in *Worcester v. Georgia* had lain dormant for a century. During that time, there was one judicial development of note. *Worcester v. Georgia* opined that treaties between the United States and Indian nations must be interpreted as the Indians would have understood them. This was a rule of obvious fairness for treaties written

only in English and explained to tribal parties by interpreters, and between parties of grossly unequal powers. The rule was extended to other agreements with tribes in *Winters v. United States* (1908). Later, the Court held that ambiguities in statutes imposed on Native Americans should be resolved in their favor. *Alaska Pacific Fisheries v. United*

Tribes have become sophisticated players on the national political scene.

States (1918). In *Lone Wolf*, the Court held that Congress, not beholden to Indian votes, had plenary power to impose its will on them. This most undemocratic relation was ameliorated by giving Indians the benefit of doubts in interpretation.

The Supreme Court's modern decisions began with its 1959 decision holding that Navajo Indians could not be sued by a white creditor in state court to collect a reservation debt. *Williams v. Lee* (1959). The Court expressly revived *Worcester v. Georgia*. Decisions since *Williams* confirmed the Indian Nations' reservation sovereignty over their members free of state jurisdiction, except when Congress clearly provides otherwise. In *California v. Cabazon Band of Mission Indians* (1987), the

Court held that states lack regulatory authority over tribal gaming enterprises. Congress reacted by passing the Indian Gaming Regulatory Act of 1988, the federal statute that is the basis for tribal gaming businesses that have enabled some tribes to improve their economies significantly.

However, in 1978 the Supreme Court held that tribes have no authority to punish non-Indians who offend against tribal law, *Oliphant v. Suquamish Tribe* (1978), and several decisions since have denied tribal civil authority over non-Indians unless based on consent or federal statute. Tribal authority to tax lessees of tribal land was upheld, *Merrion v. Jicarilla Apache Tribe* (1982), but power to tax non-Indians lacking any contractual dealings with tribes was denied. *Atkinson Trading Co. v. Shirley* (2001).

Indian nations in 2006 are distinct sovereigns within our complex constitutional system. Within tribal territory, their authority over tribal members is comparable to that of state governments, which it displaces. They lack jurisdiction over non-Indians in tribal territory, a source of dissatisfaction that tribes seek to change. Whether or not they succeed, they have survived numerous attempts to force them to disband. Tribes have become sophisticated players on the national political scene. Their struggles of the last 500 years are simply a prologue to the next.

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Separating Fact from Fiction

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and Congress but Indian Country itself. The department is spending upward of \$65 million per year for accounting work, litigation, and discovery costs that could be redirected into other Indian programs. The BIA is operating

in an environment where the requirements of the district court—such as the lack of Internet access and hampered communications with beneficiaries—cause undue, expensive delays and deficiencies in providing trust services. The BIA needs to return to its core mission of serving Indian communities instead of dedicating limited resources to responding to litigation demands. Interior has a fiduciary re-

sponsibility to American Indian trust beneficiaries and should be able to focus on the business of carrying it out.

Ross O. Swimmer is special trustee for American Indians at the U.S. Department of the Interior. He was elected to three terms as principal chief of the Cherokee Nation and served one term as assistant secretary of Indian Affairs at the Interior.

humanrights hero

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most important Indian rights cases, just like the civil rights lawyers had represented African-Americans in important cases in the civil rights movement,” he said.

Echohawk, along with other attorneys and tribal members, and with the support of the Ford Foundation, established NARF on the model of the NAACP Legal Defense and Education Fund and other civil rights impact-litigation organizations. NARF’s mission has remained unaltered for its thirty-six years:

- to preserve tribal existence,
- to protect tribal natural resources,
- to promote human rights,
- to ensure accountability of governments, and
- to develop Indian law and educate the public about Indian rights, laws, and issues.

With Echohawk at the helm, NARF’s cases and legislative successes have touched all aspects of tribal life. They range from securing federal recognition of tribal sovereignty and establishing historical rights in land and waters to helping draft and win passage of such major pieces of legislation as the Native American Graves Protection and Repatriation Act and amendments to the Voting Rights Act.

In very real and immediate ways, Echohawk has helped ensure the legacy and patrimony of tribes across the country for future generations. In so doing, he has also helped to build bridges across cultures and to ensure the integrity of long-standing legal obligations. These efforts make John Echohawk a Human Rights Hero.

Nicholas Targ, an attorney in Washington, D.C., is an adjunct professor of environmental law at Howard University School of Law. An editorial board member of Human Rights, he was an editor of this special issue.

Ever Loyal to the Land

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Sovereign Claims

Native Hawaiian claims have often been compared to those of other Native American groups. Although there are similarities, there is one significant difference: early in the development of U.S. law, the Supreme Court in *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831), characterized Indian nations as “domestic dependent nations” having some, but not all, of the attributes of sovereignty. Chief Justice John Marshall defined that limited sovereignty. Tribes were not nation states under the Law of Nations and thus lost their traditional territories based on the doctrine of discovery. While the Indian tribes did not have complete title to their lands, Marshall recognized that they had “aboriginal title” based on long possession.

Unlike Indian nations, Hawai’i was an independent sovereign recognized

by the world community of nations. Native Hawaiians were citizens of a constitutional monarchy—an organized, autonomous, sovereign state—whose independence was recognized by other nations, including the United States.

One hundred years after the overthrow of the Hawaiian kingdom, the United States finally acknowledged its complicity. Apology Resolution, Pub. L. No. 103-150 (1993). It also recognized that Native Hawaiians never directly relinquished their inherent sovereignty as a people or over their national lands. From these admissions, it is clear that Native Hawaiians have valid claims for the loss of their lands and suppression of their inherent sovereignty.

In the 1993 resolution, the United States made a commitment to “acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.” In an article examining Native Hawaiian rights to self-determination, Professor James Anaya of the University of Arizona concluded:

The United States must take effective measures to remedy the historical and continuing wrongs suffered by Native Hawaiians, measures that are in accordance with the choices of Native Hawaiians themselves and that, at a minimum, implement corresponding international human rights norms. Under international law, all peoples have the right to self-determination—and no less among them, the Native Hawaiian people.

The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs, 28 GA. L. REV. 309, 363 (1994).

Almost fifteen years after acknowledging its actions, the United States has yet to live up to its call for reconciliation or to provide a forum in which the claims of Native Hawaiians—a people who love their land—can be fully heard and resolved.

Melody Kapilialoha MacKenzie is an assistant professor and director of the Center for Excellence in Native Hawaiian Law at the William S. Richardson School of Law at the University of Hawai’i–Mānoa.
